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26 April 2013

Version of attached file:

Published Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Brooks, Thom (2001) 'Corlett on Kant, Hegel and retribution.', *Philosophy*, 76 (4). pp. 561-580.

Further information on publisher's website:

<http://dx.doi.org/10.1017/S0031819101000560>

Publisher's copyright statement:

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Corlett on Kant, Hegel, and Retribution¹

THOM BROOKS

The duty of philosophy was, rather, to remove the deception arising from misinterpretation, even at the cost of destroying the most highly extolled and cherished delusion.²

Introduction

The purpose of this essay is to appraise critically J. Angelo Corlett's recent interpretation of Kant's theory of punishment as well as his rejection of Hegel's penology. In taking Kant to be a retributivist at a primary level and a proponent of deterrence at a secondary level, I believe Corlett has inappropriately wed together Kant's distinction between moral and positive law.

However, while Corlett incorrectly attributes to Kant a mixed theory of punishment, he also incorrectly attributes to Hegel a purely retributive theory of punishment. In fact, it is Hegel, not Kant, that differentiates between retributive and deterrent justifications for punishment at the primary and secondary levels to which Corlett subscribes. It is therefore a bit of a surprise to find Corlett dismissing Hegel's theory of punishment out of hand. I will attempt to demonstrate that Corlett should not have done so.

Finally, there is a third minor difficulty with Corlett's piece. This problem is the almost timeless retributivist rejection of deterrence-based theories of punishment—particularly amongst the utilitarians—on the grounds that the latter somehow would condone in some cases the punishment of innocent persons. As this is a major objection for Corlett and many other retributivists, I will briefly search for a utilitarian that would actually condone the punishment of an innocent person. It is my contention that nearly all proponents of utilitarian- or consequentialist-based justifications of punishment are, in fact, rule-utilitarians with regard to punishment. These

¹ I am responding to J. Angelo Corlett, 'Making Sense of Retributivism,' *Philosophy*, **76** (2001), 77–110.

² Immanuel Kant, *Critique of Pure Reason*, Werner S. Pluhar (trans.) (Indianapolis: Hackett Publishing, [1781/17987] 1996), 9 [A xiii].

individuals almost always demand that no innocent person be punished as a rule of the highest order.

Does Kant have a mixed theory of punishment?

In Corlett's estimation Kant is not a pure retributivist: he is not the first to make this case.³

For Corlett, the critical passage from Kant about punishment is

[punishment] can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the grounds that he has committed a crime; for a human being may never be manipulated merely as a means to the purposes of someone else ... *He must first be found to be deserving of punishment before any consideration is given to the utility of his punishment for himself or for his fellow citizens.*⁴

In Corlett's estimation, Kant is insisting that considerations of social utility *must* figure into the justification of the institution of punishment at a secondary level.⁵ As Corlett's Kant finds non-desert factors relevant to deciding specific retributive punishments for particular wrong-doers, giving these wrong-doers what they deserve *is not all there is to justice.*⁶

I disagree with Corlett's statement that he has 'provided important textual evidence that even Kant implies that desert is

³ See Mark Tunick, 'Is Kant a Retributivist?' *History of Political Thought*, 17 (1996), 60–78.

⁴ Immanuel Kant, *The Metaphysics of Morals*, Roger J. Sullivan, translator, Mary Gregor (ed.) (Cambridge University Press, [1797] 1996), 105 [6:331]. See Corlett, 'Making Sense of Retributivism,' 86–7. [Emphasis given.] When citing all works by Kant, the first number will refer to the page in the edition cited. In the brackets, the first number refers to the volume number of the Prussian Academy of Sciences edition of Kant's works with the second number after the colon referring to the page number in this volume where the quotation is found. See Tunick, 'Is Kant a Retributivist?' 60n1.

⁵ See Corlett, 'Making Sense of Retributivism,' 87.

⁶ Corlett, 'Making Sense of Retribution,' 87. Corlett later states: 'In taking Kant seriously the retributivist need not have a difficulty in appealing to social utility considerations in expounding the concept of desert, both in justifying the institution and practice of punishment.' ('Making Sense of Retributivism,' 89.)

insufficient for the justification of, or duty to, punish.⁷ For one thing, Corlett neglects to state the sentence following the above quotation: 'The law of punishment is a categorical imperative.'⁸ Being a categorical imperative, the law of punishment must hold universally with necessity for all human beings. By universal laws, Kant refers to the idea of punishing like for like. In performing a particular action, it is supposed that we are stating to our community through our action that all human beings may act the same as we have.⁹

An example may help to clarify this important point. When thieves steal property they set up a universal maxim that all might take property too. The same goes for murderers: in murdering, the killer establishes a universal maxim that all might take the lives of others. For Kant, stealing and murdering—amongst many other crimes—are wrong in large part because they can not become universal actions. As these transgressors of the law have wrongfully subjected the law-abiding public to these harmful actions, Kant believes it is only fair and just to subject these persons to the harmful maxims they attempted to impose on their community.

It may not be too surprising then to find that Kant offers many reasons to consider him a retributivist. For one thing, he was very critical of the use of punishments as some kind of a tool to realize future goals.¹⁰ For instance, Kantian punishments must always treat human beings as ends-in-themselves and never a means to some future goal:

⁷ Corlett, 'Making Sense of Retributivism,' 103.

⁸ Kant, *Metaphysics of Morals*, 105 [6:331].

⁹ In large part, Hegel shares this view. See G. W. F. Hegel, *Elements of the Philosophy of Right*, Allen W. Wood (ed.) and H. B. Nisbet (trans.) (Cambridge University Press, [1821] 1991), 49 [§15 Addition]; 113 [§81, Remark]; 115–116 [§82, Addition]; 124–125 [§99, Remark]; 126–127 [§100, Remark]; and 131–132 [§104]. See op. cit., 117–118 [§86, Addition] and 104 [§73].

¹⁰ 'But to look upon all punishments and rewards as mere machinery in the hands of a higher power, serving only to put rational beings into activity toward their final purpose (happiness) is so patently a mechanism which does away with the freedom of their will that it need not detain us here.' Immanuel Kant, *Critique of Practical Reason*, Mary Gregor (ed. and trans.) (Cambridge University Press, [1788] 1997), 35 [5:38]. See Kant's essay 'The End of All Things' in Immanuel Kant, *Religion within the Boundaries of Mere Reason*, Allen Wood and George di Giovanni (eds) (Cambridge: Cambridge University Press, 1998), 204 [8:338–339].

Punishment by a court (poena forensis) ... can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*.¹¹

Kant clearly opposes the idea of using punishments as a means of social engineering. He is particularly adverse to the idea that punishment ought to make an example of the punished to the law-abiding community. The importance of a human being—solely on the basis that one is, in fact, a human being—must always be taken into account when determining appropriate punishments. For Kant, this means that when we punish a criminal, we must do so in a manner that takes little, if any, into account of how the punishment might affect others besides the criminal being punished. This is squarely at odds with Corlett's presentation of Kant's penal theory.

A perceptive commentator on Hegel and Kant's theories of punishment, Mark Tunick says that

[p]erhaps the most striking illustration of a retributivist position, in this case one that appears to be entirely backward-looking and oblivious to consequences, is found in a passage written by Immanuel Kant.¹²

Tunick goes on to cite from Kant's *Metaphysics of Morals*:

Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.¹³

In this example, members of this civil society have a necessary duty to execute murderers before dissolving their social contract. While all other debts might or might not be forgiven and all other contracts left unfulfilled, it is only with punishing violent criminals where we are commanded to treat them both severely and strictly. The importance given to punishing violations of justice over other concerns is not a minor matter for Kant: 'if justice goes, there is no

¹¹ Kant, *The Metaphysics of Morals*, 105 [6:331]. [Emphasis given.]

¹² Tunick, 'Is Kant a Retributivist?' 60.

¹³ Kant, *Metaphysics of Morals*, 106 [6:333]. See Tunick, 'Is Kant a Retributivist?' 60n1.

longer any value in human beings' living on the earth.'¹⁴ Indeed, some of our meaning and value as persons derive, in part, from our sacred defence of justice in human community.

It must be said that it is rather difficult to reconcile Kant's motto of equity ('the strictest right is the greatest wrong') with this insistence that all murderers are to be killed as punishment for killing someone else.¹⁵ Yet against this motto, Kant holds that

whatever undeserved evil you inflict upon another within the people, you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.¹⁶

Indeed, with regard to executing murderers, Kant in fact argues for 'the strict law of retribution' in '[t]his fitting of punishment to the crime.'¹⁷ This is justified on the grounds that strict justice is not objectionable in the least when the criminal's inner wickedness is particularly noticeable.¹⁸

One aspect of Kantian punishment that is little mentioned in the literature is the fact that, for Kant, punishment is a *physical harm*, properly understood.¹⁹ Psychological punishments or non-painful punishments are not seriously considered for most varieties of

¹⁴ Kant, *Metaphysics of Morals*, 105 [6:332].

¹⁵ Kant, *Metaphysics of Morals*, 27 [6:235]. Perhaps this apparent problem is best understood in light of the era in which Kant lived. Certainly, we can expect that the vast majority of ethical theories being developed at that time by political philosophers would allow for the state execution of what we would call today first-degree murderers. Despite his notoriety, even Cesare Beccaria favoured capital punishment in certain instances: Beccaria finds 'necessity' for executing a citizen—even though the citizen is a member of a social contract—if his or her death 'was the only real way of restraining others from committing crimes.' (Cesare Beccaria [Cesare Bonesana, Marquis di Beccaria], Henry Paolucci (trans.) *On Crimes and Punishments* (New York: Library of Liberal Arts/Bobbs-Merrill, [1764] 1963), 46.)

¹⁶ Kant, *Metaphysics of Morals*, 105 [6:332].

¹⁷ Kant, *Metaphysics of Morals*, 106 [6:332].

¹⁸ Kant, *Metaphysics of Morals*, 106–107 [6:333]. See 107 [6:334]. Other interesting examples involve Kant's suggested punishments for rape, pederasty, and bestiality. Op. cit., 130 [6:363].

¹⁹ Kant, *Critique of Practical Reason*, 34 [5:37]. Ernest van der Haag shares this view: 'punishment must, whenever possible, impose pain believed to exceed the pain suffered by the individual victim of the crime. No less is deserved.' ('Refuting Reiman and Nathanson,' *Philosophy and Public Affairs*, 14 (1985), 167.

crime.²⁰ In fact, physical infliction of punishment upon a criminal is a necessary consequence in the allocation of justice, even if the criminal transgression precipitating the punishment is not naturally connected with moral wickedness.²¹ The criminal ‘pays’ for the crime she committed by experiencing a certain amount of, potentially lethal, pain.²²

When I mention how Kant finds pain necessary to punishment, I do not wish to imply that Kant was some kind of sadist—to be clear, he was certainly not. In fact, he finds rewards offered to the public by the government to be ‘more in harmony with morality’ than punishments.²³

Was then Kant a retributivist? There seems to be a second conflicting account we can give of Kant’s theory of punishment. He was also a proponent of deterrence as a justification for punishment. He is quite explicit in stating that governments *can* and *do* only impose *deterrent punishments*.²⁴ This is true because, for Kant, governments are primarily concerned with pragmatic matters, rather than with justice *per se*. On this view, retributive punishments are only to be ‘imposed by a being who is guided by moral standards.’²⁵ This would imply that theories of deterrence might be at times immoral in character and inadequate in some way when compared with theories of retribution. Oddly, the tables seem to have turned suddenly: if governments in Kant’s view only impose deterrent punishments, then any Kantian theory of punishment must be beholden to *deterrence*, not retribution, as the main justification for punishing.

One example ignored by nearly all commentators on Kant’s theory of punishment is the fact that in certain instances no punishment should be inflicted, even where the guilty parties *deserve* to

²⁰ There is an exception for crimes where the appropriate manner of punishing criminals is to levy fines. Moreover, wealthy criminals who will not be ‘hurt’ by the fine are to be publicly embarrassed, perhaps a form of psychological punishment. (Kant, *The Metaphysics of Morals*, 106 [6:332].)

²¹ Kant, *Critique of Practical Reason*, 34–5 [5:37].

²² See Tom Sorell, *Moral Theory and Capital Punishment* (Oxford: Basil Blackwell, 1987), 134.

²³ Immanuel Kant, *Lecture on Ethics*, Louis Infield (trans.) (Indianapolis: Hackett Publishing, [1930] 1963), 57.

²⁴ Kant, *Lecture on Ethics*, 55. This statement mirrors Fichte’s belief that the purpose of punishment is solely to deter. (See J. G. Fichte, *Foundations of Natural Right*, Frederick Neuhouser (ed.), Michael Bauer (trans.) (Cambridge University Press, [1795–1796] 2000.), 226–248 [§20].)

²⁵ Kant, *Lecture on Ethics*, 55.

be punished.²⁶ In the 'Doctrine of Right,' Kant supposes that we have before us murderers and their accomplices. The idea of judicial legal authority, which I will touch on shortly, dictates that all of these persons must be executed in accordance with universal laws. Interestingly, Kant states that should the number of criminals be so great a number that the state would be left without any subjects if these persons were all executed,

the sovereign must also have it in his power, in this case of necessity (*casus necessitatis*), to assume the role of judge (to represent him) and pronounce a judgment that decrees for the criminals a sentence other than capital punishment, such as deportation, which still preserves the population.²⁷

While we had seen that, for Kant, punishments were to be calibrated and distributed to guilty persons as ends-in-themselves, we now discover that this does not hold absolutely.

It would have been interesting to see Kant follow this pronouncement with an alteration of his 'blood guilt' scenario. Suppose he asked us to imagine a small island community which housed a condemned murderer in its only prison. Instead of wishing to disband their community irrespective of the fate of their sole murderer, imagine that the community earnestly threatens their leader by promising to abandon the island and leave the sovereign without subjects if he chose to execute the condemned prisoner. We saw before that Kant would demand that the prisoner be killed, otherwise the community shares in the guilt of his crime. In light of the above passage, however, it appears that—blood guilt or not,—the sovereign ought to alter or annul the condemned prisoner's sentence when the consequences of acting otherwise would be terminating the community.

Kant gives us several more reasons to suppose that the purpose of penal laws is primarily to deter. The more well known example he

²⁶ I know of only three treatments: B. Sharon Byrd, 'Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution,' *Law and Philosophy*, 8 (1989), 196, 196n144; Don Scheid, 'Kant's Retributivism,' *Ethics*, 93 (1983), 268–271; and Tunick, 'Is Kant a Retributivist?' 63. Corlett takes this view only with regard to his own personal theory of punishment. ('Making Sense of Retributivism,' 78, 78n7.) He believes his theory of punishment 'emulates Immanuel Kant's view that, though desert is what serves as the primary justification of punishment, considerations of social utility may serve as secondary reasons to punish.' (Corlett, 'Making Sense of Retributivism,' 78.)

²⁷ Kant, *Metaphysics of Morals*, 107 [6:334].

gives is where two shipwrecked men fight over a raft which will hold only one of them.²⁸ Should one of the men push the other off the raft—drowning him—in order to save his own life, the surviving man is ‘to be morally condemned but not legally punished.’²⁹ Kant’s reason is

the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an ill that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an ill that is *certain* (drowning). Hence the deed of saving one’s life by violence is not to be judged *inculpable* (*inculpabile*) but only *unpunishable* (*impunible*).³⁰

In part, the surviving person was fulfilling his duty to preserve his own life.³¹ Kant also argues against punishing mothers who kill their illegitimate children and soldiers who murder each other in duels on the same grounds: these persons ought not to be punished for the punishment would not deter others in committing the same actions in the future.³²

How do we reconcile these two views? For starters, both pictures differ from the one Corlett presents us with. To reiterate his interpretation of Kant, Corlett’s Kant believes that we (α) affix criminality due solely to retributive justifications and then (β) serve particular punishments to guilty persons due—at least in part—to consequentialist concerns.

I have offered a starkly different Kant. First, I have demonstrated that in some instances Kant seems to be concerned solely with retributive justifications for punishing and for particular punishments. For example, recall the illustration of the island community about to dissolve with a murderer left in its prison: the community *must* execute the murderer for the sake of justice or otherwise the community shares in the murderer’s guilt. Second, I have shown that there are many other instances where Kant seems to justify punishing criminals solely on consequentialist grounds, where if persons can not be deterred by the threat of punishment they ought not to be punished at all. One example is Kant’s statement that governments are solely concerned with punishments that deter.

²⁸ See Kant, *Metaphysics of Morals*, 28 [6:235–236].

²⁹ I take this phrase from Tunick, ‘Is Kant a Retributivist?’ 65.

³⁰ Kant, *Metaphysics of Morals*, 28 [6:235–236]. [Emphasis given.]

³¹ Kant, *Groundwork of the Metaphysics of Morals*, 11 [4:397].

³² Kant, *Metaphysics of Morals*, 108–109, [6:336–337].

Does Kant even have a sound theory of punishment?³³ Which Kant is the most accurate? Insightfully, Tunick is quite right to point out that

if deterrence is the guiding consideration in determining what is a crime, it is hard to see why justice is at stake when we legally punish, apart from the merely procedural justice of implementing a practice fairly.³⁴

I would propose that the apparent contradiction is due mostly to a misreading of Kant, for when Kant is writing in favour of one version of punishment rather than another he is doing so in very different contexts.

For Kant, there is a dichotomy of juridical (i.e., positive) law and moral law. Juridical laws concern themselves solely with external actions and their conformity to a government's legislation – which may or may be rational.³⁵ To follow a juridical law is to act solely in keeping with the written legislation governing a human community. When we act in accordance with these laws, we act legally but we may not always be acting morally.

The moral law is, for Kant, first and foremost expressed in the categorical imperative, which asserts practical and necessary obligations on all human beings.³⁶ This imperative commands us to act only in such a way that our maxim—expressed by our action—can be a universal law.³⁷ As rational beings, we act within a 'kingdom of ends' whereby we subject ourselves to universal laws at one and the same time we perform particular actions.³⁸ The significance is that the moral law 'governs' universally over all human beings with absolute necessity.

³³ See Jeffrie Murphy, 'Doe Kant Have a Theory of Punishment?' *Columbia Law Review*, 87 (1987), 509–532. At 509 Murphy states 'I am not even sure that Kant develops anything that deserves to be called a *theory* of punishment at all. I genuinely wonder if he has done much more than leave us with a random (and not entirely consistent) set of *remarks*.'

³⁴ Tunick, 'Is Kant a Retributivist?' 77–78.

³⁵ See Kant, *Metaphysics of Morals*, 14 [6:220]. As positive laws may be irrational, Kant's argument against the right to sedition or rebellion against the state may be problematic. See Kant, *Metaphysics of Morals*, 96–97 [6:320].

³⁶ Kant, *Metaphysics of Morals*, 15 [6:222–223]. See op. cit., 19 [6:227] and Kant, *Groundwork of the Metaphysics of Morals*, 5 [4:392].

³⁷ Kant, *Groundwork of the Metaphysics of Morals*, 15 [4:402] and 31 [4:421].

³⁸ Kant, *Groundwork of the Metaphysics of Morals*, 41 [4:432] and 42 [4:434]. See op. cit., 40 [4:432].

Most importantly, this law becomes the standard by which we can judge the moral correctness of our every action. If I steal a piece of fruit from a vender, what might happen if everyone was allowed to act likewise? If I refrain from lying, what might happen if others followed suit? By acting in accordance with morality, a human being can fully exist as an end-in-itself 'since only through this is it possible to be a lawgiving member in the kingdom of ends.'³⁹

From a purely *moral* perspective, when we do punish criminals, it is essential that we first justify the punishment as an act of justice: 'this constitutes what is essential in this concept [of punishment].'⁴⁰ In other words, punishment must be primarily commensurable with justice in order for it to be distributed to a particular person. This implies that punishment ought to be given only to the guilty and within certain limits. With regard to the violation of moral laws, Kant is clearly in favour of retributive measures of punishing transgressors. When we are instead discussing the violation of juridical (positive) law—as Corlett was—Kant concerns himself primarily with deterrence-based justifications for punishment. This dichotomy is rarely appreciated by commentators on Kant's political philosophy.⁴¹

Rather confusingly, Kant does suggest that when we violate the moral law our transgression deserves punishment.⁴² More specifically, for Kant, the '*rightful* effect' resulting from the transgression of the moral law (the categorical imperative) is '*punishment* (*poena*).'⁴³ This may be understood in one of two ways. One interpretation is that persons who violate the moral law *ought* to be punished for their violation—punishment is the '*rightful* effect'—but these persons may avoid being punished.

On the other hand, this apparent problem is perhaps best understood as an argument for the importance of intentionality for the distribution of punishments. The moral law is particularly concerned with the state of mind and decision-making process of a human being, whereas the juridical law is particularly concerned with the external actions of a human being independent of the reasons for acting. As Kant insists:

³⁹ Kant, *Groundwork of the Metaphysics of Morals*, 42 [4:435].

⁴⁰ Kant, *Critique of Practical Reason*, 34 [5:37].

⁴¹ The only—and best—treatment of Kant's theory of punishment is Tunick, 'Is Kant a Retributivist?' 60–78, esp. 77–78. A somewhat similar dichotomy is present in Hegel. See Hegel, *Elements of the Philosophy of Right*, 121 [§94 Addition].

⁴² Kant, *Critique of Practical Reason*, 34 [5:37].

⁴³ Kant, *Metaphysics of Morals*, 19 [6:227]. [Emphasis given.]

the state of mind of the subject, whether he committed the deed in a state of agitation or with cool deliberation, makes a difference in imputation, which has results.⁴⁴

When punishing, we ought to consider not only the crime committed, but the ‘inner wickedness’ of the criminal in performing a transgression of the law.⁴⁵ While positive laws concern the external actions of persons primarily—as moral laws especially concern themselves with the internal thought process of persons—the nature of a person’s intentions in performing an action in violation of the positive law is an important factor in attributing punishable guilt. Those who break these laws deliberately are more culpable for their criminal action(s) than those who do so unintentionally.⁴⁶

Of course, we should not always assume that a criminal’s intentionality is united in their criminal actions: only in certain instances are the two fully connected.⁴⁷ On some occasions, a criminal action may well be an unintended consequence. This gap between the perceived—our physical movements—and the unperceived—the state of our moral disposition—marks the difficulty of this project of calibrating punishments to persons with regard to their moral guilt.

Kant holds that the concept of right is located ‘directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone.’⁴⁸ Therefore, to act in accordance with the moral law through the categorical imperative is to act in a manner fully commensurable with right.⁴⁹ The connection between punishment and right is explicit: ‘[r]ight and authorization to use coercion therefore mean one and the same thing.’⁵⁰ This connection is dependent upon

⁴⁴ Kant, *Metaphysics of Morals*, 20 [6:228].

⁴⁵ Kant, *Metaphysics of Morals*, 106–107 [6:333].

⁴⁶ I am referring to the common legal distinctions of *actus reus* and *mens rea* and their often critical importance in attributing punishments to criminals.

⁴⁷ Kant, *Metaphysics of Morals*, 108 [6:335]. See Kant, *Groundwork of the Metaphysics of Morals*, 13 [4:399–400] and 19–20 [4:407].

⁴⁸ Kant, *Metaphysics of Morals*, 25 [6:232]. Moreover, the duties of right are ‘duties for which external lawgiving is possible.’ External lawgiving is only impossible for duties of virtue. See Kant, *Metaphysics of Morals*, 31 [6:239].

⁴⁹ A society which is not in accord with right is a state of nature, which society must strive to avoid at all costs. See Kant, *Metaphysics of Morals*, 85 [6:306] and (‘each may impel the other by force to leave this state [i.e., the state of nature] and enter into a rightful condition’) 90 [6:312]. See also Kant, *Groundwork of the Metaphysics of Morals*, 31 [4:421].

⁵⁰ Kant, *Metaphysics of Morals*, 26 [6:232]. See op. cit., 26 [6:234].

the desirability of universalizing specific actions. In concert with the moral law, if a given action is acceptable under these circumstances it is fully in keeping with right, thus giving the presiding authority the (legal and moral) justification to employ coercion against persons who perform actions which are non-universalizable.

In addition, Kant does seem to believe that human beings—while they are subject to the particular laws of their place of residence—ought to follow the moral law at all times.⁵¹ The moral law is not some utopian ideal we might aspire to, yet never fulfil. Instead, the significance given to the moral law via reason is that ‘the moral law is solely practical,’ its realization by human beings is a true possibility and not a product of wishful thinking.⁵² It is this moral law which determines the concept of right and wrong, our standard by which we fine tune legislation in the effort to unite as closely as possible the human law with the moral law.⁵³

A particularly good illustration is in Kant’s justification of the penal ‘quandry’ he arrives at in (α) having established that transgressors of the law ought to be punished according to the dictates of retribution and (β) the existence of certain exceptional cases, such as murdering a fellow soldier in a duel. He says

The knot can be undone in the following way: the categorical imperative of penal justice remains (unlawful killing of another must be punished by death); but the legislation itself (and consequently also the civil constitution), as long as it remains barbarous and undeveloped, is responsible for the discrepancy between the incentives of honour in the people (subjectively) and the measures that are (objectively) suitable for its purpose. So the public justice arising from the state becomes an *injustice* from the perspective of the justice arising from the people.⁵⁴

We can now fully appreciate what Kant is telling us. From the standpoint of the moral law, the positive law may well be inadequate. Indeed, we might best evaluate juridical law via moral law. However, this is one standpoint. The other standpoint is that of the state which deals with practical matters of external actions, which it must try to

⁵¹ See Kant, *Critique of Practical Reason*, 35–36 [5:38], 70–71 [5:82–4] and 79 [5:93]; Kant, *Metaphysics of Morals*, 9 [6:215].

⁵² Kant, *Critique of Practical Reason*, 44 [5:50]. See op. cit., 74 [5:86–87] and Kant, *Metaphysics of Morals*, 42–43 [6:252–253].

⁵³ See Kant, *Critique of Practical Reason*, 54 [5:63] and Kant, *Metaphysics of Morals*, 16 [6:223–224]. See also Kant’s discussion of public right at Kant, *Metaphysics of Morals*, 89 [6:311].

⁵⁴ Kant, *Metaphysics of Morals*, 109 [6:336–337]. [Emphasis given.]

influence. In practical ethical concerns such as actual state legislation, justice is served when the letter of the law is observed.

In closing, a sovereign which offers pardons to criminals—whether through reducing or eliminating their sentence—performs ‘injustice in the highest degree.’⁵⁵ But this is only in relation to the moral law existing internally in human beings which we can discern barely and with much difficulty. From the standpoint of *juridical* law the sovereign who offers pardons acts justly if this pardon positively colours certain consequences.

Corlett therefore misinterprets Kant’s entire penal project. Kant is not retributivist at a primary level and then open to considerations of social utility at a secondary level, that of affixing specific punishments to particular criminals. Instead, when Kant is arguing on behalf of retributive- or deterrent-based justifications he does so from different standpoints. The retributive Kant is concerned with transgressions of the moral law, the deterrent Kant with juridical law. Indeed, it is easy to confuse the two as Kant does seem to take into account moral culpability when determining a criminal’s severity of punishment. The problem with Corlett’s interpretation, in my view, is that he confuses these two standpoints when justifying his own version of proportional punishment.⁵⁶

Was Hegel a ‘pure retributivist’?

Quite surprisingly, Corlett is very dismissive of Hegel’s theory of punishment. All he has to say about Hegel is stated in one short footnote:

A less sophisticated, yet none the less pure, version of retributivism than that articulated by Rawls is found in G. W. F. Hegel.⁵⁷

To add insult to injury, Corlett cites only one paragraph—from Hegel’s *Philosophy of Right*—to support his case.⁵⁸ A quick exami-

⁵⁵ Kant, *Metaphysics of Morals*, 109 [6:337].

⁵⁶ As we will soon see in the next section on Hegel’s theory of punishment, I believe that Corlett would have done much better had he depended upon Hegel as his ideological foundation, rather than Kant.

⁵⁷ Corlett, ‘Making Sense of Retributivism,’ 80n13.

⁵⁸ See Corlett, ‘Making Sense of Retributivism,’ 80n13. The paragraph he looks at is §100 from G. W. F. Hegel, *The Philosophy of Right*, F[sic] M. Knox (trans.) (Oxford University Press, 1942), 70–1. The translator was, in fact, Sir T.M. Knox.

nation of what Corlett has cited is revealing. In §100, the paragraph in question, Hegel mirrors Kant's idea that criminals ought to be punished by universal laws:

[the action of a criminal] is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right.⁵⁹

But is Hegel a pure retributivist? In his remark to §100, he says that apart from these considerations, the form in which the righting of wrong exists in the state, namely punishment, is not its only form.⁶⁰

In other words, it is essential that we punish only guilty persons. For Hegel, being a criminal consists in acting in a manner that resists universalizability—not unlike Kant—assuming that the positive law is fully rational.⁶¹ Therefore, our primary consideration of 'who should be punished' is easily answered: only the guilty parties. However, 'apart from these considerations,' Hegel specifically states that the actual form in which we punish a criminal is not strictly retributive—'the form in which the righting of wrong exists in the state, namely punishment, is not its only form'⁶²—and the governing authority may take extra-retributive justifications for a particular punishment into account.

Far more important is the following §101 and its long remark where Hegel defines retribution:

The annulment of the crime is retribution in so far as (a) retribution in *conception* is an 'injury of the injury', and (b) since as existent a crime is something determinate in its scope both qualitatively and quantitatively, its negation as *existent* is similarly determinate. This identity rests on the concept, but it is not an equality between the specific character of the crime and that of its negation; *on the contrary, the two injuries are equal only in respect of their implicit character, i.e. in respect of their 'value'*.⁶³

Here Hegel explicitly condemns the usage of 'like for like' (i.e.,

⁵⁹ Hegel, *The Philosophy of Right*, 70 [§100].

⁶⁰ Hegel, *The Philosophy of Right*, 71 [§100 Remark].

⁶¹ Hegel assumes that over time rationality will be fully commensurable with what 'is actual.'

⁶² Hegel, *The Philosophy of Right*, 70 [§100].

⁶³ Hegel, *The Philosophy of Right*, 71 [§101]. [Emphasis added.]

pure retributive justifications for punishment) and instead argues for equality of 'value,' not equality of 'kind.' My claim that this is most revealing refers to the fact that Corlett's theory of punishment aims to make 'significantly more plausible a [specific] model of punishment,'⁶⁴ a version of proportional retributive punishment.⁶⁵ In Corlett's brand of punishment,

punishment is justifiably inflicted on an offender only if it 'weighs' the same for the offender on a scale of suffering as the offense 'weighs' (or would 'weigh' on such a scale if the victim is incompetent or dead) to the victim on a scale of suffering.⁶⁶

Corlett is mistaken in looking for his intellectual forebearer in Kant, as it is Hegel who offers a theory of punishment that is (α) proportional in terms of value, (β) retributivist at the primary level, and (γ) takes into consideration consequences of social utility when determining the actual, particular punishment to be implemented.

As Hegel aptly notes, the 'identity' of a crime and retributive punishment in kind is 'not an *equality* in the specific character of the infringement.'⁶⁷ This is to say that while punishments must befall only the guilty in accordance with the principle that only the guilty should be punished,⁶⁸ it must only be, at best, 'an *approximate* fulfilment' of the precipitating crime.⁶⁹

To further illustrate Hegel's clarity on this issue, he says

an insuperable difficulty arises when we come to determine punishments ... it is very easy to portray the retributive aspect of punishment as an absurdity (theft as retribution for theft, robbery for robbery, an eye for an eye, and a tooth for a tooth, so that one can even imagine the miscreant as one-eyed or toothless); but the concept has nothing to do with this absurdity, for which the introduction of that [idea of] *specific equality* is alone to blame ... [E]quality remains merely the basic measure of the criminal's *essential* deserts, but not of the specific external shape which the retribution should take. It is only in terms of this specific shape that theft and robbery [on the one hand] and fines and imprisonment etc. [on the other] are completely unequal, *whereas in terms*

⁶⁴ Corlett, 'Making Sense of Retributivism,' 110.

⁶⁵ See Corlett, 'Making Sense of Retributivism,' 94–95.

⁶⁶ Corlett, 'Making Sense of Retributivism,' 95.

⁶⁷ Hegel, *Elements of the Philosophy of Right*, 127 [§101]. [Emphasis given.]

⁶⁸ See Hegel, *Elements of the Philosophy of Right*, 127 [§101 Remark].

⁶⁹ Hegel, *Elements of the Philosophy of Right*, 128 [§101 Remark]. [Emphasis given.]

of their value, i.e. their universal character as injuries [*Verletzungen*], they are comparable.⁷⁰

So long as the criminal to be punished is, in fact, responsible for her crime, the weighing of punishments with regard to crimes is not to be done on a strict nor reciprocal ('eye for an eye') basis *at all*.⁷¹ The person guilty of assault need not be assaulted himself in prison, as we may employ a variety of different punishments so long as there is at least 'comparative' values between the crime committed and the punishment allocated. Should we do otherwise, Hegel notes that we might view the attribution of specific punishments for particular crimes as arbitrary.⁷² In fact, how we affix punishments to crimes is not arbitrary, but rational—although the best manner of acting may not yet be fully transparent.⁷³

Lastly, Hegel does not consider *merely* the practice of punishment at his time, but, instead, the shape and force of penal laws through history:

With the progress of education, however, attitudes toward crime become more lenient, and punishments today are not nearly so harsh as they were a hundred years ago. It is not the crimes or

⁷⁰ Hegel, *Elements of the Philosophy of Right*, 128–129 [§101 Remark]. [Brackets and emphasis given.]

⁷¹ Of course, the one big exception is with murder: 'although retribution cannot aim to achieve specific equality, this is not the case with murder, which necessarily incurs the death penalty. For since life is the entire compass of existence [*Dasein*], the punishment [for murder] cannot consist [*bestehen*] in a value—since none is equivalent to life—but only in the taking of another life.' Hegel, *Elements of the Philosophy of Right*, 129–130 [§101 Addition. [Emphasis given.]

Perhaps what Hegel *should* have said is that the *lex talionis* is an argument based upon some measure of equivalence. In a sense, it is somewhat of a coincidence that the most severe crime (i.e., murder)—or, at least, one of the most severe—is punished by the most severe punishment (i.e., execution). Hegel could have then argued that he is not making any special exceptions in this instance, as he would not be justifying his position on the basis that no punishment other than death would be appropriate for murderers. The equivalency between a murderer and his punishment would then only be in *value*, not in kind. The biggest drawback to this argument is the fact that Hegel never offers it. If he had, his argument for capital punishment would have been more consistent. I am indebted to Brian O'Connor for this insight.

⁷² Hegel, *Elements of the Philosophy of Right*, 129 [§101 Addition].

⁷³ A fully transparent method would be available in a completely rational system of matching punishments with particular crimes.

punishments themselves which change, but the relation between the two.⁷⁴

For Hegel, there is no absolute standard by which we may affix punishments to crimes. We do this task in virtue of values we attribute to the harm created by a crime versus the appropriateness of a punishment for the crime in question. The values we assign both the crime and the punishment are given to fluctuation over time, in large part due, for Hegel, to the expansion and improvement of education.

The upshot is that Hegel's theory of punishment accounts for qualitative calibrations of punishments for particular crimes. In addition, these attributions are far from absolute and are given to change over time. The sole criteria by which we choose which punishment to inflict is the punishment's approximate fulfilment of some value, derived from how we assess the original harm created by a crime.

If I were to mention only one paragraph from Hegel's *Philosophy of Right* as a complete summary of his views on punishment—which I would not do⁷⁵—I might choose §99 where Hegel says:

The various considerations which are relevant to punishment as a phenomenon [*Erscheinung*] and to its relation [*Beziehung*] to the particular consciousness, and which concern its effect on representational thought (as a deterrent, corrective, etc.), are of essential significance in their proper context, though primarily only in connection with the *modality* of punishment. But they take it for granted that punishment in and for itself is *just*.⁷⁶

It is quite clear that, for Hegel, there is a primary consideration of justice: is the person under consideration of being punished for a transgression of the law actually guilty of the act? If the answer is 'yes,' we may then affix any number of punishments—within a given range determined by roughly equivalent values of punishments for crimes—whether they be retributive, deterrents,

⁷⁴ Hegel, *Elements of the Philosophy of Right*, 123 [§96 Addition].

⁷⁵ Through out this discussion I have almost without exception stuck with the small third section of 'Abstract Right,' in Hegel's *Philosophy of Right*, entitled 'Wrong.' This is not the only section in the *Philosophy of Right* where Hegel discusses punishment, nor the only work—in particular, there are rich discussions of punishment in Hegel's *Natural Law* and *System of Ethical Life*. I have avoided these works—as Corlett has—to demonstrate only that what he did not avoid (i.e., *The Philosophy of Right*) was particularly assessed inaccurately.

⁷⁶ Hegel, *Elements of the Philosophy of Right*, 125 [§99 Remark]. [Emphasis given.]

reformative, etc. In this sense, Hegel is more than just a progressive ahead of his contemporaries. He offers a superb foundation from which to build any retributive-based theory of punishment which takes social utility considerations into account when affixing particular punishments as Corlett's theory of punishment does.

Do Utilitarians Punish Innocent People?

The standard objection raised against utilitarian justifications of punishment by retributivists is that it might permit punishing innocent persons. Corlett is no exception in this regard.⁷⁷ Even when so-called rule-utilitarian/consequentialists such as John Rawls claim that 'utilitarians agree that punishment is to be inflicted only for the violation of law,'⁷⁸ this assurance is not enough to satisfy Corlett:

Could not utilitarianism justify, in principle, the one-time and 'minor' punishment of an unknown individual (a person beyond society's purview of concern) who is innocent?⁷⁹

One distinction I like to make is between 'naive utilitarianism' and 'classical utilitarianism.' 'Naive utilitarianism' refers to what I believe is a misperception of utilitarianism. This view is most infamous for permitting the punishment of innocent people. On the other hand, 'classical utilitarianism' refers to Jeremy Bentham's version of utilitarianism.

I would argue that nearly all utilitarians are rule- or act-utilitarians in one guise or another. For nearly *all* utilitarians, as a rule, there is a prohibition against punishing innocent people.⁸⁰ In fact, I would go so far as to say that it is rather challenging to come up with utilitarians who would permit the practice.⁸¹

⁷⁷ See Corlett, 'Making Sense of Retributivism,' 77, 83–4. Other commentators who make the same error are Igor Primoratz, *Justifying Legal Punishment* (Atlantic Highlands: Humanities Press, 1989), 61 and Sorell, *Moral Theory and Capital Punishment*, 64. This reading is addressed in my 'Utilitarianism, Capital Punishment, and Innocent Persons,' *Review Journal of Philosophy & Social Science* (forthcoming).

⁷⁸ John Rawls, *Collected Papers*, Samuel Freeman (ed.) (Cambridge: Harvard University Press, 1999), 24. See Corlett, 'Making Sense of Retributivism,' 83n20.

⁷⁹ Corlett, 'Making Sense of Retributivism,' 83–4.

⁸⁰ See Jeffrie Murphy, *Kant: The Philosophy of Right* (London: Macmillan, 1970), 141 and Tunick, 'Is Kant a Retributivist?' 68, 68n44.

⁸¹ Only two come to mind: Thomas Hobbes and Cesare Beccaria (in emergency cases where punishing an innocent person is the only thing that would keep the state intact).

Utilitarians such as Jeremy Bentham, James Mill, and John Stuart Mill—as well as consequentialists like Rawls—all state that a person must be guilty of a crime to be legally punished.⁸² Unfortunately, few scholars accept this as true. For example, Igor Primoratz tends to read into Bentham that all utilitarians, on Bentham's account, ought to commit themselves to punishing innocent people when it 'is the alternative with the best consequences attainable.'⁸³ On this reading, punishment ought only to be given when it is useful: a punishment's usefulness serves as its sole justification.⁸⁴

In a move in step with much of the popular perception of utilitarianism, Primoratz extends, quite unfairly, this characterization of Bentham's theory of punishment to *all* utilitarians:

A utilitarian is immune to this sense of the tragic and to the feeling of guilt which brings it about. From her point of view, whenever the balance of consequences favours 'punishing' the innocent, that is all there is to it, morally speaking; so one should 'punish' them and feel no compunction.⁸⁵

I believe that Primoratz is basing his allegation on a fictional straw man called naive utilitarianism. Bentham's utilitarianism, for instance, is much to the contrary. Without any turn towards some kind of majoritarian calculus, Bentham holds that those who prosecute innocent people for crimes they did not commit *are wrong*.⁸⁶ Bentham argues that all the penal law is concerned with doing 'is to measure the depravity of the disposition where the act is mischievous.'⁸⁷ Such a disposition does not exist in innocent people.

Punishment is an evil, for Bentham.⁸⁸ And as an evil, there are only certain conditions which would warrant its use. There are four limits that Bentham puts upon all punishments. Bentham's first

⁸² For example, see James Mill, *Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations* (New York: Augustus M. Kelly Publishers, [1825] 1967), 16–7 in 'Jurisprudence' and 4 in 'Liberty of the Press'; John Stuart Mill, 'Speech in Favour of Capital Punishment,' in Peter Singer (ed.) *Applied Ethics* (Oxford University Press, 1986), 102–3; and Rawls, *Collected Papers*, 24. I will give a full defence of Bentham below.

⁸³ Primoratz, *Justifying Legal Punishment*, 25.

⁸⁴ Primoratz, *Justifying Legal Punishment*, 26.

⁸⁵ Primoratz, *Justifying Legal Punishment*, 61.

⁸⁶ Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Darien: Hafner Publishing, [1780] 1970), 93–4.

⁸⁷ Bentham, *Introduction to the Principles of Morals and Legislation*, 142.

⁸⁸ Bentham, *Introduction to the Principles of Morals and Legislation*, 170.

limit is that punishments are not to be *groundless*.⁸⁹ That is to say that where there is no wrongdoing or evil to prevent, *there is no reason to punish*. Groundless punishment can also be a punishment which has caused some degree of harm to a person or group of persons with, however, the affected person(s) full consent (*volenti non fit injuria*). We might note immediately that Bentham—according to his very first limitation on punishment—is against punishing someone who is innocent. It is unclear to me how he could be more explicit.

I see Bentham as a rule-utilitarian as he follows utilitarian calculative concerns provided that certain conditions have previously been met. For Bentham to sanction the punishment of someone, s/he must be guilty of a crime for which s/he is being punished.

It might be objected that I have only demonstrated the fact that one utilitarian of many would not punish innocent persons. My reply is simple: if Bentham—the father of classical utilitarianism—is not guilty of the charge (as well as James Mill, J. S. Mill, and Rawls),⁹⁰ what utilitarian is? Corlett's fear of utilitarians punishing innocent persons may be due more to a misreading rather than a substantial worry.

Conclusion

While one of Corlett's main claims—that retributivism can justify itself as a practice and as particular acts of a practice—is sound, he states much that is quite problematic. In particular, I hope to have demonstrated that while he wished to use Kant as his intellectual forebearer with regard to his own mixed view of punishment, he would have been much better off using Hegel, whom he incorrectly dismisses out of hand. In fact, Corlett's characterization of Kant's theory of punishment is hampered by his inability to distinguish between Kant's dichotomy of juridical and moral law. Instead, Corlett confuses and conflates this dichotomy.

In addition, I hope to have raised questions regarding the categorical denigration of utilitarian- and consequentialist-based theories of punishment by retributivists on the grounds that the former would justify the punishment of innocent persons. In fact, we find that few, if any, such theorists would condone such a move. These theorists tend to be predominantly rule-utilitarians whose first proposition is to punish the guilty only. Therefore, Corlett's fears are ill-placed.

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⁸⁹ Bentham, *Introduction to the Principles of Morals and Legislation*, 171–2.

⁹⁰ See note 82 above.